

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 January 18, 2019

17 10:09 AM

18

19

20

21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JUSTIN

1 HEARING re Notice of Agenda of Matters Scheduled for Hearing
2 on January 18, 2019 at 10:00 a.m. (document # 1602)

3
4 HEARING re Debtors' Motion for Approval of Global Bidding
5 Procedures (document #429)

6
7 HEARING re Motion Of Certain Utility Companies To Determine
8 Adequate Assurance Of Payment Pursuant To Section 366(c) Of
9 The Bankruptcy Code (document #1395)

10
11 HEARING re Application of Debtors for Entry of Order
12 Approving Amendment to Terms and Conditions of the Debtors'
13 Employment and Retention of Lazard Freres & Co. LLC as
14 Investment Banker (document #1435)

15
16 HEARING re Notice of Intent to Conduct Store Closing Sales
17 (document #1444)

18
19 HEARING re Motion of Greenhorn Ventures LLC for Order (I)
20 Compelling the Debtor to Reject a Non-residential Real
21 Property Lease Pursuant to 11 U.S.C. §365(d)(2); or in the
22 Alternative (II) Establishing a Deadline by Which the Debtor
23 Must Assume and Cure all Defaults or Reject the Lease; and
24 (III) Modifying the Automatic Stay to Permit Greenhorn
25 Venture to Pursue its Rights, Including those Related to the

Debtors Continuing Defaults under the Lease Pursuant to 11
U.S.C. §362(d)(1) together exhibits (document #969)

HEARING re Motion for Relief from Stay to Allow Civil
Litigation in Action (1) and for Action, (2) To Proceed, and
for the Parties to Proceed with Alternative Dispute
Resolution (ADR) and Settlement Negotiations to which had Begun
Since July 27, 2018, with Certificate of Service (document
#1006)

HEARING re Motion for Relief from Stay (related
document(s)1) filed by Cynthia L Pollick on behalf of Karen
Smith (document # 1126)

HEARING re Motion of Debtors for Entry of an Order Extending
the Automatic Stay to Certain Non-Debtor Parties (document
#924)This matter is going forward on a contested basis
solely with respect to the Objections of Karen Smith
(document #s 1298, #1335, and #1559) The objection of Qazim
B. Krasniqui (document #1187) has been adjourned to March
21, 2019. The remainder of objections have been adjourned to
February 14, 2019 at 10:00 AM.

Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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22 ALSO PRESENT TELEPHONICALLY:

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25 JOSEPH BADTKE-BERKOW

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2 RYAN M. BARTLEY
3 ELIZABETH A. BEITLER
4 DANIEL BESI KOF
5 LAUREN N. BESLOW
6 SOMA BISWAS
7 ALIX BROZMAN
8 JULIAN BULAON
9 JONATHAN D. CANFIELD
10 PATRICK W. CAROTHERS
11 GERARD T. CICERO
12 BRYAN M. CIMALA
13 R. JOHN CLARK
14 SARA COELHO
15 PATRICK T. COLLINS
16 ANDREW DIAZ
17 JASON DIBATTISTA
18 TED A. DILLMAN
19 MARK E. FELGER
20 ROBERT E. FITZGERALD
21 DEBORAH L. FLETCHER
22 STEPHANIE J. GLEASON
23 IVAN M. GOLD
24 SUSAN D. GOLDEN
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1 MARC HANKIN
2 TAYLOR B. HARRISON
3 CATHERINE HEITZENRATER
4 MICHAEL HERZ
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6 CHRISTOPHER ISIDORE
7 RUSSELL R. JOHNSON, III
8 GERALD P. KENNEDY
9 MATTHEW KOCH
10 NICHOLAS KRISLOV
11 THOMAS LABUDA JR.
12 ZACHARY D. LANIER
13 FERNAND L. LAUDUMIEY
14 ZACHARY D. LEVINE
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24 PATRICK MOHAN
25 KEVIN M. NEWMAN

1 RYAN O'CONNOR
2 THOMAS ONDER
3 RICHARD PEDONE
4 JON PRUCHANSKY
5 NAVAID QURESHI
6 RYAN REINERT
7 STEVEN J. REISMAN
8 ROBERT RITACCO
9 DAVID ROSENZWEIG
10 CHRISTOPHER SAFAYA
11 JOHN F. SAUL
12 COURTNEY A. SCHAEEL
13 MICHAEL L. SCHEIN
14 PAUL SCHWARTZBERG
15 WENDY SIMKULAK
16 MICHAEL J. SMALL
17 STEVEN SMITH
18 FREDRIC SOSNICK
19 CHRIS STAUBLE
20 DAN SWETNAM
21 EMILY TOMLINSON
22 AUSTIN H. VINY
23 ROBERT WEISBERG
24 EVAN J. ZUCKER
25 LAUREN E. ZUMBACH

1 P R O C E E D I N G S

2 THE COURT: Please be seated. Okay, good morning.
3 In Re. Sears Holding Corporation.

4 MR. SCHROCK: Good morning, Your Honor. Ray
5 Schrock of Weil, Gotshal & Manges on behalf of the Debtors.
6 I'm here with my partners today and colleagues from Weil,
7 along with Mo Meghi, the Debtors' CRO, as well as Brandon
8 Aebersold, the Debtors' lead investment banker.

9 THE COURT: Okay.

10 MR. SCHROCK: Thank you for making time available
11 today, Your Honor, before the hearing for a chambers
12 conference.

13 I'll try and keep my remarks brief in terms of the
14 results of the auction. But in short, I'm extremely pleased
15 to report to the Court that at roughly 3:00 a.m. yesterday,
16 we closed the auction record with ESL being declared the
17 successful bidder for the sale of substantially all the
18 Debtors' assets.

19 There is a 111-page APA that's very detailed,
20 that's been fully negotiated between the parties, and that
21 will be filed with the Court later today, along with a
22 notice of a successful bid. And I would encourage parties
23 to take their time looking through the contract because
24 there are many nuanced provisions that are included in
25 there.

1 But in short, it provides for a retail footprint,
2 you know, of approximately 425 stores under the Sears and
3 Kmart brands, that target businesses include the network of
4 specialty stores including Sears Auto Centers, the Shop Your
5 Way membership program, Monarch Premium Appliance Company,
6 Innoval, and Sears Home Services, including the parts direct
7 business and material contracts related thereto.

8 This is an extremely important moment for Sears
9 and its 45,000 employees, and the restructuring committee
10 has worked extremely hard to come to the right decision for
11 the benefit of all stakeholders. We completely understand
12 that not everybody is going to agree with the company's
13 decision, but we do believe firmly that this is in the
14 estate's, the company's, and all stakeholders' best
15 interests, and we've come to the best result possible for
16 all concerned.

17 I think that we'll -- we're going to have a meet
18 and confer later today with the Official Committee of
19 Unsecured Creditors regarding discovery issues. As the
20 Court saw, they did file a standing motion, they filed --
21 and they do intend to object to the sale, and we very much
22 look forward to putting on our case for the benefit of
23 Sears.

24 In terms of scheduling, Your Honor, as we
25 discussed in chambers, we would -- we do think it would make

1 sense to start the hearing on February 4th, so that the
2 Debtors could file their reply on February 1st, along with
3 the evidence that will be required to approve the sale for
4 the Court to consider the sale. But we think giving, you
5 know, the Court, then parties-in-interest the weekend would
6 be, you know, the better route, rather than starting on
7 February 1st.

8 THE COURT: Okay. I dug out the November 19 order
9 approving global bidding procedures. And from what you told
10 me, it looks like you've done, or will be doing right after
11 this hearing, the first couple of things that are required
12 under that order, which is to file the transaction documents
13 and provide the notice.

14 And I just want to make sure you all go through
15 that order again to make sure you provide the other notices
16 that are contemplated there, including the assumption of
17 assignment notices, which also include the date for any
18 objections to be filed and served.

19 The hearing scheduling that you've suggested makes
20 sense to me. I'd originally reserved today for the 1st with
21 some time, not a full day, on the 4th, but we can start
22 instead on the 4th and then have a full day on the 6th. The
23 4th may or may not be more than a couple of hours. The
24 clerk's office, to sort of help arrange for my calendar,
25 gets notice from Debtors' law firms as to whether they are

1 contemplating filing a case. And as you all know, since you
2 represent debtors a lot, frequently those days get moved
3 because people are talking, and they file later.

4 So right now, it's possible that a case will be
5 filed that requires a hearing that day. If that doesn't
6 happen, then obviously, I'll have a lot more time on the
7 4th, but I have a full day on the 6th.

8 Other thing I want to say is that my normal
9 practice for contested evidentiary hearings, and I
10 contemplate these hearings to be evidentiary and, at least
11 for now based on my understanding, there will be at least
12 one objection to them and perhaps more to the relief sought
13 by the Debtor.

14 My practice for contested evidentiary hearings is
15 to take direct testimony by witnesses who are under the
16 parties' control by declaration or affidavit, to have that
17 be submitted with sufficient time so that the parties can
18 review it and I can review it, as the direct testimony here.
19 I would think that should have to come in on the 1st and be
20 delivered in chambers on the 1st during business hours. And
21 then to have the witness be present for redirect.

22 Obviously, if someone is not under your control,
23 you're going to have to subpoena them and get them, get them
24 here, and I'll hear them live on direct.

25 If anyone intends to submit expert testimony -- I

1 don't know if they do; this isn't a valuation case, but
2 conceivably, there may be expert testimony -- the expert
3 report can serve as the direct testimony with just a, you
4 know, one-page, one paragraph, frankly -- declaration or
5 affidavit saying this would constitute my direct testimony.

6 And as far as exhibits are concerned, my normal
7 practice is to require the parties to meet and confer and
8 try to agree on the admissibility of as many exhibits as
9 they can, and to do that well in advance of the time when
10 they would be submitting a joint exhibit book to chambers,
11 which, again, should be on the 1st during business hours,
12 which will require you to meet before then to discuss
13 exhibits.

14 If the parties can't agree on the admissibility of
15 a particular exhibit, put it in, or all of them, in a
16 different binder. And I generally -- I'd prefer
17 admissibility issues at the evidentiary hearing and
18 discourage motions in limine.

19 If knowing the answer on a motion in limine really
20 will change your whole trial strategy, I guess you can
21 submit one and I'll hear it. But given the short timeframe
22 here, I think you should assume that it's more likely that
23 I'll just rule on an evidentiary objection when it comes up.

24 Lastly, there is some time for depositions. If
25 parties want to designate deposition testimony, I strongly

1 urge them to do two things: one, to highlight it so that I
2 won't be pouring through the whole deposition to figure out
3 what it is that you want me to focus on; and for the other
4 side to highlight it, you know, anything that they want to
5 have in a different colored marker.

6 And also -- and I think this is equally important
7 -- point out to me why you believe that this deposition
8 testimony is relevant and why you're introducing it, which
9 leads to the last point.

10 I normally do not take opening arguments unless
11 the parties just simply want to identify the issues, but I
12 generally can figure that out from the submissions. But I
13 do give party the change -- parties the chance to give
14 closing arguments, and that's when you would tell me why you
15 think any deposition testimony is relevant and why. I
16 should think so.

17 And I generally rule from the bench in matters
18 that are time sensitive, and so you should assume that that
19 might well happen.

20 MR. SCHROCK: Thank you very much, Your Honor.
21 Yeah, we are familiar with your standard operating
22 procedure. We'll intend to follow that. And certainly,
23 from the Debtors' perspective, we do not intend on
24 presenting opening arguments; just moving straight to the
25 evidence.

1 THE COURT: Okay. And, you know, obviously, there
2 are leases and contracts that are contemplated to be assumed
3 and assigned as part of this transaction. I see counsel for
4 certain landlords who are here, but others may not, so you
5 should make sure they understand those ground rules. They
6 can get the CD for today's hearing and play it back if they
7 want to, but just make sure they're aware of that too.

8 MR. SCHROCK: And, Your Honor, just one more point
9 just on the substance of the transaction. Importantly from,
10 you know, from the Debtors' perspective, the people should
11 take a careful look through the release provisions and the
12 asset purchase agreement because it's the Debtors' intent
13 that although there is in effect the ability for ESL and its
14 related parties to credit bid, that there's otherwise not a
15 release that's contemplated under the terms of that
16 document.

17 And we are -- even though we're in the mode of
18 having to get this sale approved and litigated with the
19 Creditors' Committee on an expedited basis, we're not going
20 to give up trying to, you know, garner their support. And
21 we will -- we'll continue those efforts in anticipation of
22 the hearing.

23 THE COURT: Okay. Well, again, I haven't seen the
24 document and it will speak for itself. I suppose that there
25 needs to be some form of disclosure; maybe ESL has already

1 made some disclosure because it's a reporting company or the
2 like.

3 MR. SCHROCK: Yes, they did file a 13(d), Your
4 Honor.

5 THE COURT: All right, but the document will speak
6 for itself. And people that want to understand the
7 transaction need to read the document because that's the key
8 thing.

9 MR. DIZENGOFF: Good morning, Your Honor. Again,
10 Ira Dizengoff, Akin Gump Strauss Hauer & Feld, on behalf of
11 the Official Committee of Unsecured Creditors.

12 I rise just to reiterate to you what we've
13 previously discussed with the Court and with the Debtors.
14 We have concerns about this, but I'm not going to go into
15 any substance about that; that's for trial, and we'll lay
16 out those issues together with you.

17 The documentation is lengthy. We've digested it
18 summarily. But just to comment on one thing that Ray said
19 about the release provisions. They speak for themselves;
20 they're also always subject to interpretation. We'll
21 articulate to you the concerns that we have about that, and
22 we'll discuss that another day in connection with the trial.

23 But the Committee has had concerns about prior to
24 the transaction; that's part of the evidentiary record that
25 we'll put in front of you. And then the end of the day,

1 we'll tell you why we don't think this deal makes sense.

2 THE COURT: Okay.

3 MR. DIZENGOFF: Thank you.

4 THE COURT: And that's fine. Everyone's rights
5 are obviously reserved under -- so the lawyers understand
6 this -- under the global bidding procedures order, the
7 auction results are to be announced, but it's subject to the
8 hearing that will be an evidentiary hearing that I'm going
9 to have early next month. And parties-in-interest will have
10 their opportunity to object under the applicable standards
11 on that basis.

12 MR. BAIRD: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. BAIRD: Michael Baird of behalf of Pension
15 Benefit Guaranty Corporation. I'll keep my remarks brief.
16 I just wanted to educate the Court that we do intend to
17 object to the ESL bid. We share the concerns of the
18 Committee. And for avoidance of doubt, we reserve all
19 rights and remedies. Thank you, Your Honor.

20 THE COURT: Okay, that's fine. I obviously don't
21 know the basis for the objection. I am pleased to see at
22 least the possibility of preserving this business as a going
23 concern, including tens of thousands of jobs. I obviously
24 want to make sure that that prospect is a real one. I would
25 hate to see the equivalent of a sellout that Citi Field be

1 suddenly out of work, if you can visualize that, and I hope
2 that doesn't happen.

3 And ultimately, this will be decided on legal
4 standards, not on personalities; the press and perhaps some
5 of those very employees may not understand that. But the
6 real issue is not whether you like or dislike the individual
7 ultimately behind the ESL bid, in large measure, but whether
8 the bid is the best for this company, the people that work
9 for it, the United States government through the PBGC, and
10 the other creditors.

11 MR. SCHROCK: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. SCHROCK: Your Honor, if we could just take
14 the next item out of order, the Lazard motion to amend their
15 retention application.

16 THE COURT: Okay. Let me, let me --

17 MR. SCHROCK: It's Item 3, instead of what's here.

18 THE COURT: Right. I'm going to go to that tab.
19 So where going to generally follow the agenda.

20 MR. SCHROCK: We're going to follow, correct,
21 except for this one.

22 THE COURT: Well, actually, I think --

23 MR. SCHROCK: We're hoping it's not a long
24 hearing.

25 THE COURT: I think this is the next one. Because

1 as I understand it, the utility matter is adjourned, right?
2 This is just a status conference. So we'll talk about the
3 status conference, but let's move to the -- to the Lazard
4 proposed amendment.

5 MR. SCHROCK: And, Your Honor, I believe that Mr.
6 Schwartzberg from the Office of the United States Trustee
7 was planning on appearing telephonically.

8 THE COURT: Okay. Are you on the phone, Mr.
9 Schwartzberg? I know their office has been, unfortunately,
10 pinched by the --

11 MR. SCHROCK: By the shutdown.

12 THE COURT: -- by the shutdown. They have been
13 appearing in cases, however. Mr. Schwartzberg, I just want
14 to make -- can you make sure that the phone is on? Okay.
15 Mr. Schwartzberg, are you on the phone?

16 MR. SCHROCK: He did inform us, Your Honor, that
17 he was appearing telephonically.

18 THE COURT: Okay. Well, was this going to go
19 forward or --

20 MR. SCHROCK: Yeah. Yes, it is going to go
21 forward. It's the only objection that was from the Office
22 of the United States Trustee.

23 THE COURT: Okay.

24 MR. SCHROCK: There was some confusion just around
25 the -- I don't know if -- I think your chambers had been

1 dialing the separate -- they had been dialing the separate
2 line. They thought there was another line. I just want to
3 make sure that people are actually on the line. Perhaps,
4 Your Honor, maybe we take this out of order.

5 THE COURT: Yeah.

6 MR. SCHROCK: And we can try and raise Mr.
7 Schwartzberg.

8 THE COURT: Can you send an email to directly get
9 ahold of Mr. -- email Mr. Schwartzberg and have him dial in?
10 Okay. So let's, why don't we do No. 4 then.

11 MR. SCHROCK: Okay, very good.

12 THE COURT: Well, actually, why don't we go back
13 to No. 2.

14 MR. SCHROCK: Back to No. 2.

15 THE COURT: Yeah, which I think was just a status
16 conference.

17 MS. LIOU: Good morning, Your Honor. Jessica Liou
18 from Weil, Gotshal & Manges on behalf of the Debtors.
19 Agenda Item No. 2 is the contested motion of certain
20 utilities to determine adequate assurance of payment
21 pursuant to Section 366(c) of the Bankruptcy Code, filed at
22 ECF 1395. It's been joined by Jackson EMC, filed at 15 --
23 ECF 1533.

24 THE COURT: Right.

25 MS. LIOU: It is just --

1 THE COURT: Can I just interrupt you? Do you have
2 anyone on the phone for this motion, their 366 motion?

3 [OFF MIC]

4 THE COURT: And maybe everyone is on.

5 [OFF MIC]

6 MS. LIOU: That's right, because we were informed
7 by opposing counsel that they would be making an appearance
8 telephonically.

9 THE COURT: And so, I'm going to -- at least
10 boring the people who are in the courtroom or having them
11 have a deja vu moment, I'm going to summarize the first item
12 that we did discuss on the agenda before I realized that,
13 for some reason, the Court Call had you all on hold.

14 The first item on the agenda is a status
15 conference on the global bidding procedures. As you all
16 remember, I entered an order on November 19th setting forth
17 global bidding procedures for all or substantially all of
18 the Debtors' assets. The Debtors' counsel, Mr. Schrock,
19 announced that at 3:00 a.m. yesterday?

20 MR. SCHROCK: Yes.

21 THE COURT: Yesterday, the Debtors closed the
22 auction, which I had authorized them at their request to
23 continue for another day, having accepted an improved bid
24 from ESL and other entities working with it. The bid has
25 been documented in a roughly 110-page purchase agreement

1 that will be filed this morning.

2 The Debtors also will file or have filed a notice
3 of sale. Both of those filings are contemplated by the
4 November 19th order. I said to Mr. Schrock that there are -
5 - there's at least one other notice that needs to go out in,
6 I think, five days dealing with contracts to be assumed --
7 contracts and leases to be assumed and assigned under the
8 transaction.

9 I'd originally scheduled February 1st as the
10 hearing on the proposed sale, to give parties a little more
11 time. In light of the fact that that will be an evidentiary
12 hearing, and probably will be a contested evidentiary
13 hearing, we will instead start the sale hearing on February
14 4th and continue it on February 6th. On February 4th, I may
15 only have a couple of hours; it depends on at least one
16 other matter that may or may not have to be heard in the
17 afternoon that day.

18 I also went through the customary procedures that
19 I have for handling evidentiary hearings, and I noted that
20 the Debtors should make those procedures clear to any party
21 that's not present today, either in person or by phone.

22 They are to take direct testimony by declaration
23 or affidavit, with the witness to be present in the
24 courtroom live for cross and re-direct. Obviously, parties'
25 witnesses who are not under their control, they need to

1 ensure that they're there for live testimony.

2 Any expert testimony would be in the form of the
3 expert report with a one-paragraph statement that this would
4 constitute the expert's testimony.

5 I also require the parties to meet and confer,
6 having identified their proposed exhibits, and meet and
7 confer to agree on the admissibility of as many of those as
8 possible and to submit a joint exhibit book to chambers.
9 Both the exhibit book and the declarations should be
10 submitted on the first during normal business hours, 1st of
11 February.

12 Any exhibits, the admissibility which the parties
13 dispute, should be put in a separate binder and submitted to
14 chambers. And I will, in all likelihood, rule on their
15 admissibility during the hearing, as opposed to encouraging
16 any motions in limine.

17 I stand ready to hear the parties on any discovery
18 disputes, but I require the parties to, you know, use their
19 best efforts to resolve the dispute before setting up a
20 discovery call by an email to chambers. And that's the
21 first thing I'll ask, obviously, is what efforts have been
22 made to resolve the dispute.

23 You should designate any deposition excerpts or
24 transcripts in highlighted marker and submit those to
25 chambers with the declarations, and be sure to highlight why

1 an oral argument at the close of the evidentiary hearing,
2 why you believe those expert -- excerpts are relevant.

3 Lastly, because this is obviously a time-sensitive
4 matter, it's likely that I will rule from the bench. And I
5 won't take opening arguments. I'm assuming the parties'
6 pleadings will lay out what they believe the issues are, but
7 I do give parties the chance to give me a brief closing
8 argument commenting on the evidence.

9 The counsel for the Debtor, I think wisely,
10 decided not to summarize the proposed transaction in
11 anything more than the most general terms; instead, invited
12 the parties to review the document which will be on file.
13 He did state, and I agreed with him, that it would be a very
14 good thing if the Debtors could reorganize in a way that
15 would save all or substantially all of the remaining jobs of
16 the workforce, which have been described as anywhere between
17 45,000 and 50,000 people.

18 But other than that, the parties really should
19 focus on the terms of the transaction, which are detailed,
20 including the aspects of the transaction that preserve
21 claims against, or potential claims, against ESL and
22 affiliated entities.

23 The Creditors' Committee and one member of the
24 Committee, the PBGC, rose to reserve their rights. And we
25 had had a chambers conference before this hearing where it

1 was made clear to me that, in all likelihood, there will be
2 some form of objection to the transaction; and that's why
3 we're discussing, in some detail, the ground rules for the
4 hearing.

5 I don't know if anyone wants to add anything to
6 that. You're certainly free on the phone -- and I apologize
7 again for the -- for having you all on hold during that
8 discussion. But you're certainly free to get the CD
9 recording or certainly the transcript, but the CD recording
10 will happen a lot faster, of this hearing.

11 So anything else to say on that?

12 MR. SCHROCK: I think that was a great summary,
13 Judge.

14 THE COURT: Okay.

15 MR. SCHROCK: Nothing here.

16 THE COURT: All right. So then we'll -- we will
17 go to turn then, Mr. Schwartzberg, to the Debtors' motion to
18 amend the terms of Lazard's retention.

19 MR. SCHWARTZBERG: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. SCHROCK: Thank you. Thank you, Your Honor,
22 and, once again, good morning.

23 So Item No. 3 on the agenda is the Debtors'
24 request to amend the terms, the engagement letter of their
25 investment bankers, Lazard Freres; that's at ECF #1435.

1 With me in court this morning are Brandon
2 Aebersold, the managing director of Lazard, who is the lead
3 investment banker on this engagement, and the Debtors' Chief
4 Restructuring Officer, Mo Meghi of M3 Partners, who
5 submitted declaration in support of the application, which
6 can be found at docket entry #1580.

7 The only objection to the application is the
8 objection of the United States Trustee at ECF #41454. And
9 as we've heard, Mr. Schwartzberg is participating by phone.

10 In an effort to resolve the objection, essentially
11 provided the additional detail that is in our reply to the
12 U.S. Trustee; and, unfortunately, that information was not
13 deemed sufficient by the U.S. Trustee.

14 And I need to provide a little bit of background,
15 Your Honor, for why we moved to amend Lazard's engagement
16 letter. When Lazard was engaged by the Debtors, they had a
17 provision in their engagement letter that was really heavily
18 negotiated, two of them that were particularly heavily
19 negotiated:

20 One was the overall fee cap of \$12.5 million,
21 which for a case of this size is very -- you know, we
22 thought was a very good deal, frankly, for the estate; and
23 then the second was that that Lazard had discretion as to
24 whether or not to undertake a particular sale assignment.

25 THE COURT: Where does that appear? I see the fee

1 cap, but I don't see the discretion point.

2 MR. SCHROCK: It's in Paragraph 1(k). Okay, it's
3 in (indiscernible).

4 THE COURT: Oh, I see. Subject to Lazard's
5 agreement so to act, assisting the company in identifying
6 and evaluating candidates for any potential sale
7 transaction.

8 MR. SCHROCK: Exactly.

9 THE COURT: Advising the company in connection
10 with negotiations and aiding in the consummation of any sale
11 transaction.

12 MR. SCHROCK: And the reason -- and the sale fee
13 is substantially below market. But the reason that was in
14 there is the Debtors were not sure if they were going to use
15 Lazard for sale transactions, or whether or not they would,
16 in fact, be engaging another investment banker for
17 particular, for a particular asset sale.

18 So the back and forth between the parties was
19 really, you know, the trade effectively was we'll have a
20 lower sale cap, but, you know, they're going to have to have
21 discretion around the sale transaction fee.

22 And in November and, you know, in October post-
23 petition going into early November, there were extensive
24 negotiations with the restructuring committee and Lazard
25 around the fact that they were going to have to put -- that

1 if one, that the restructuring committee asked them to
2 handle a number of other asset sales, including the
3 individual assets sales of Sears Home Services, Parts
4 Direct, Innovel. Marketing other substantial business units
5 contemporaneously is what's contemplated under the global
6 asset sale procedures.

7 So in exchange for -- you know, after, you know,
8 quite a bit of negotiation, in exchange for eliminating the
9 discretion under the engagement letter and having Lazard,
10 you know, act as the Debtors' investment banker in
11 connection with all of those sales, Lazard put at least two
12 additional investment banking teams on the mandate to work
13 with on evaluating all of the liquidation proposals, to work
14 on the -- a number of the retail individual sales. And they
15 ran full processes contemporaneous with the global sale for
16 those individual business units.

17 The trade on that was to increase the fee cap by
18 \$7 million. And the Debtors, their view was, listen, this
19 is still a very good deal. We consulted with the Creditors'
20 Committee in going through this. We talked to the other
21 consultation parties.

22 But, you know, I know that the motions just up
23 now, Your Honor, but, you know, Lazard has been acting in
24 good faith ever since that deal was struck in November. We
25 believe that the fee is still well within -- and, frankly,

1 for a case of this size, below market standards.

2 THE COURT: Well, could I just make -- you're not
3 changing 2(e), which sets the 55 basis points fee.

4 MR. SCHROCK: We're not, Your Honor.

5 THE COURT: You're raising the cap.

6 MR. SCHROCK: We're just raising the cap; that's
7 it, Your Honor. So we still get the benefit of very below-
8 market asset sale fee, which normally, I would see, you
9 know, a hundred basis points on fees.

10 THE COURT: And you're representing the, even the
11 motion is dated December 28th, that Lazard really was doing
12 the, quote "extra work" after this cap increase was
13 negotiated?

14 MR. SCHROCK: Yes. They were -- there was quite a
15 negotiation before the Thanksgiving Day holiday on this
16 particular issue. They were able to reach a resolution, you
17 know, with the restructuring -- with the restructuring
18 committee. And we, you know, they put those people, you
19 know, on the matter.

20 And, you know, listen, we were doing -- obviously,
21 we've been pretty busy in the case. We've documented it as
22 quickly as we could, and we put it up. But due to the
23 holiday, this was the holiday, this was the next omnibus
24 hearing by the time we were able to file the documentation.

25 THE COURT: Okay. So it's really not -- I mean, I

1 can see -- I can see how the U.S. Trustee made the
2 objection, because it's hard to know what it was that was
3 cut from the documents, and even from the motion what it was
4 that Lazard was originally contemplated to do with respect
5 to sales, which you just admitted they included within the
6 cap, original cap of 12.5 million, and what was new that was
7 negotiated in return for them doing the -- accepting, as
8 they had the right, on your 1(k) to not accept additional
9 work.

10 MR. SCHWARTZBERG: Your Honor, Paul Schwartzberg
11 for the U.S. Trustee's Office.

12 THE COURT: Yes.

13 MR. SCHWARTZBERG: I'd just point out, as Mr.
14 Schrock pointed out, 1(k) allows them to agree to do the
15 work or not.

16 THE COURT: Right.

17 MR. SCHWARTZBERG: 2(e) provides the method or the
18 way to calculate their fee. But 2(f) indicates that if they
19 do it and the fees are calculated and they are subject to
20 2(e), that their capped at 12.5. So it appears that 2(f)
21 already contemplated the method by which they were going to
22 be paid and their ability to accept or reject.

23 THE COURT: Well, if they do the work. I
24 understand that, but they also have the right not to do it.

25 MR. SCHWARTZBERG: Yes.

1 THE COURT: And, I guess, Mr. Schrock's point is
2 that because things were being done in real time, they were
3 asked to do -- they agreed to do the extra work. It would
4 have been less work that they had the right to opt out of.
5 They agreed to do the extra work, and -- but that was
6 premised upon raising the cap.

7 MR. SCHROCK: Yeah. And I'll represent to the
8 Court, listen, without this, the cap being raised, you know,
9 we would have been in front of you asking for approval of,
10 frankly, a separate --

11 THE COURT: Immediately.

12 MR. SCHROCK: Yeah, separate engagement, you know,
13 of a new, of a new banker to handle some of these individual
14 asset sales that were taking place contemporaneously with
15 the global asset sale procedures.

16 THE COURT: Okay. So I interrupted you, Mr.
17 Schwartzberg, but go ahead.

18 MR. SCHWARTZBERG: Oh, well, my point was, it
19 appears they had originally negotiated a cap of 12.5, and it
20 contemplated -- and essentially 2(f) contemplated that they
21 were going to get paid under 2(e), they were subject to that
22 cap. So it seems that they right reached the deal, and now
23 they realize it might take more work, so they want to
24 increase that deal.

25 THE COURT: That's why I wanted to highlight 1(k).

1 The deal also included they're not doing the certain work,
2 any work they chose not to do, so I think that's the
3 important distinction here. Look, I mean, 328(a) works both
4 ways: it works to provide, subject to a very limited right
5 to adjust, the professional with comfort that they will get
6 paid; it also, subject to only a very limited right to
7 adjust, gives the professional -- it sticks the professional
8 with that deal and nothing more.

9 But, ultimately, it's a matter of contract
10 interpretation, because we're really not talking here about
11 the exception to 328(a), which is circumstances that could
12 not have been anticipated at the time. So what you fall
13 back on is contract interpretation, which is what Judge
14 Walrath in In Re. Washington Mutual, Inc., 2018 B.R. Lexus
15 291, (B.R. Delaware, February 2, 2018).

16 And it seems to me when we take into account the
17 relevant exceptions of the agreement, which is the basis for
18 the 328(a) retention, you have to read them all together,
19 and that includes 1(k).

20 So it appears to me that under these facts, based
21 on the record before me, this is not a re-trade, but rather
22 what the parties contemplated in terms of playing out the
23 terms of their agreement, which include Section 1(k) and
24 mandating Lazard to do the work.

25 The actual compensation under 2(e), which is that

1 55 basis points, has not been attacked by anyone, so it
2 really is just whether raising the cap is permitted by the
3 contract. And I believe it is under 1(k) as a quick pro quo
4 for them actually doing the work, agreeing to do the work
5 that they had the right not to do, and that it's a fair cap.

6 And I think the former has been established by the
7 record; as to the latter, no one has objected to that. And,
8 frankly, I'm focusing on the 55 basis points anyway, which I
9 don't think is -- I mean, no one has suggested that that was
10 an unfair compensation term.

11 So I'll grant the motion and overrule the
12 objection. Again, I had many of the same questions you had,
13 Mr. Schwartzberg, but I think based on the record before me,
14 they've been answered.

15 MR. SCHROCK: Thank you, Your Honor.

16 MR. SCHWARTZBERG: Thank you, Your Honor.

17 THE COURT: Okay.

18 MS. LIOU: Good morning, Your Honor. For the
19 record again, Jessica Liou, Weil, Gotshal & Manges on behalf
20 of the Debtors. Agenda Item No. 2, which we've taken out of
21 order, is the contested motion of certain utilities for
22 adequate assurance payment under Section 366(c) of
23 Bankruptcy Code; that's been filed at ECF 1395. It's been
24 joined by Jackson EMC, who's filing at ECF 1533.

25 This is only moving forward as a status conference

1 today.

2 THE COURT: Let me just -- let me interrupt you.
3 Is there anyone on the phone who wants to be heard on this
4 matter too, so I should get your appearance?

5 MR. JOHNSON: Yes, Your Honor. Russel Johnson on
6 behalf of Appalachian Power Company and the other utilities.
7 Just to note those pleadings at Docket #1395 and 1533.

8 THE COURT: All right. Good morning.

9 MR. JOHNSON: Good morning.

10 THE COURT: Okay. And the agenda letter for this
11 hearing says that this will be simply a status conference on
12 this motion. I think that's what you were about to tell me,
13 right?

14 MS. LIOU: Yes, that's right, Your Honor.

15 THE COURT: Okay.

16 MS. LIOU: The parties remain in ongoing
17 settlement discussions. To the extent that we need to move
18 forward on a contested basis, we are adjourning this matter
19 to February 14th. And we have established a consensual
20 extension of the Debtors' objection deadline to the motion
21 to Monday, February 4th, and the reply deadline for opposing
22 counsel will be February 12th.

23 THE COURT: Okay. Is that your understanding too
24 on the phone?

25 MR. JOHNSON: Yes, Your Honor. Russel Johnson for

1 the utilities. That is correct, Your Honor.

2 THE COURT: Okay. Thanks, Mr. Johnson. It
3 appears to me that that's obviously a good idea. The motion
4 was complicated, even though it's made on behalf of many
5 utilities, many of them are in different -- very different
6 factual circumstances. And my utility order sort of
7 authorized the Debtors to engage in negotiations as well, so
8 I encourage you to do that.

9 MS. LIOU: We will continue those discussions,
10 Your Honor. If you have no further questions, I'll cede the
11 podium to my colleague, Candace Arthur --

12 THE COURT: Okay.

13 MS. LIOU: -- who will be handling the next item
14 on the agenda.

15 THE COURT: Okay, thank you.

16 MS. ARTHUR: Good morning, Your Honor. For the
17 record, Candace Arthur, Weil, Gotshal & Manges on behalf of
18 Sears Holdings Corporations and its affiliated debtors.

19 Your Honor, the next item on the agenda speaks to
20 the Debtors' GOB notice. The parties have actually resolved
21 it by stipulation that we submitted to your chambers this
22 morning.

23 THE COURT: Right. I saw that, with Libby Dial
24 Enterprises.

25 MS. ARTHUR: Yes, Your Honor.

1 THE COURT: But that, that objection was withdrawn
2 with prejudice.

3 MS. ARTHUR: Exactly, Your Honor.

4 THE COURT: Okay.

5 MS. ARTHUR: So even though it's appearing on the
6 agenda letter, that's just the status update for that
7 particular item.

8 THE COURT: Okay. And the one remaining limited
9 objection was adjourned to the 14th.

10 MS. ARTHUR: Yes, Your Honor.

11 THE COURT: By One (indiscernible) Park Boulevard.

12 MS. ARTHUR: Yes.

13 THE COURT: Okay.

14 MS. ARTHUR: The next item on the agenda is
15 actually filed by Greenhorn Ventures LLC. I don't know if
16 counsel is in the courtroom today. I will cede the podium
17 to counsel.

18 THE COURT: Okay.

19 MS. KIRBY: Good morning, Your Honor. Greenhorn
20 Ventures is a landlord of one of the Idaho properties. The
21 basis for the motion to lift the automatic stay has four
22 points.

23 Number one, the December and January rent has been
24 unpaid. There was, Greenhorn is a new owner of the
25 property. They purchased the property in November 2018.

1 They sent several letters notifying the Debtor of their
2 address. They didn't receive their rent. They have been in
3 communication with the lease administrator.

4 THE COURT: That actually wasn't alleged in the
5 original motion.

6 MS. KIRBY: Correct, Your Honor.

7 THE COURT: I think that's a recent development,
8 right?

9 MS. KIRBY: That's correct.

10 THE COURT: Okay.

11 MS. KIRBY: Since the motion was filed in
12 November, the December and January rent have not been
13 received. But I'm letting the Court know that we have been
14 in contact with the lease administrator, who indicates that
15 the rent will be paid sometime in February, but we haven't
16 received it yet.

17 THE COURT: Okay. There was some indication it
18 was paid to the prior lessor.

19 MS. KIRBY: The checks were sent to the wrong
20 place. Correct, the checks were sent to the wrong place.

21 THE COURT: Okay.

22 MS. KIRBY: The second --

23 THE COURT: So that doesn't seem like a reason to
24 terminate the lease and lift the stay.

25 MS. KIRBY: Well, I'll leave that to Your Honor's

1 discretion.

2 THE COURT: Okay. Well, that's my discretion.

3 MS. KIRBY: Yes, absolutely. Your Honor, the
4 second ground for the motion also arose, since the second
5 ground to lift the stay arose since the motion was filed in
6 November, which was on December 10th, a mechanic's lien was
7 filed against the property in the amount of \$135,000, which
8 accrues under Idaho law at the rate of 21 percent interest.

9 The lease, as pointed out in the opposition to --
10 the lease provides 30 days to cure; that 30 days has passed.
11 And to my -- I've been in communication with Debtors'
12 counsel who said they -- the business folks were planning to
13 talk to the mechanic's lienor to try to resolve it. But to
14 my knowledge, the 30-day period in which they had to cure
15 has passed, and I'm unaware of any resolution of that.

16 THE COURT: Is this a pre- or post-petition debt
17 that the mechanic's lien law is asserting?

18 MS. KIRBY: Pre.

19 THE COURT: Pre, okay. All right. So they would
20 need to get stay relief to do anything.

21 MS. KIRBY: The lienor?

22 THE COURT: Yeah.

23 MS. KIRBY: I don't think so. The lien is against
24 the property as to Greenhorn, so they certainly could pursue
25 the owner of the property in a foreclosure action.

1 THE COURT: But it's to enforce -- it's to enforce
2 a debt against the Debtor ultimately, right?

3 MS. KIRBY: That's -- well, they can collect that
4 from the owner of the property. And under Idaho law, the
5 mechanic's lien relates back to when the work was done,
6 which was before Greenhorn purchased the property;
7 therefore, they're in first position on the property, and
8 they certainly could bring a foreclosure of their lien.

9 THE COURT: But wouldn't they be naming the
10 Debtors as part of a foreclosure action, since the Debtor is
11 the tenant?

12 MS. KIRBY: I don't --

13 THE COURT: Wouldn't they be looking to kick out
14 the Debtor?

15 MS. KIRBY: They would be looking to foreclose on
16 their mechanic's lien against the property, correct.

17 THE COURT: Right, which would include the
18 Debtors' interest as the tenant.

19 MS. KIRBY: I assume so, Your Honor.

20 THE COURT: Okay.

21 MS. KIRBY: I do know from debtor cases that I've
22 handled, that the lienors can proceed against the owner of
23 the property because the automatic stay doesn't cover the
24 owner of the property.

25 THE COURT: Yes, but the means of proceeding, I

1 think, would include the Debtor, which would -- they need to
2 get stay relief on.

3 MS. KIRBY: I don't think so.

4 THE COURT: All right.

5 MS. KIRBY: But I'm not a hundred percent sure.

6 THE COURT: Okay.

7 MS. KIRBY: And the two other grounds for the
8 request for stay relief were set forth in the original
9 November motion, which are the oil tanks, which the Debtor
10 has responded to; that the concern with the filing at the
11 local environmental IDEQ --

12 THE COURT: Right.

13 MS. KIRBY: -- was the regulatory body, indicated
14 that it was a mistake on their website, and they've cured
15 it.

16 THE COURT: Right.

17 MS. KIRBY: So that situation has been cleared up.
18 And the other is the encroachment of an expansion of the
19 property by the Debtor onto the neighboring property owner.
20 The Debtor couches this and something that happened long ago
21 and why are we complaining of it now. It was discovered in
22 connection with the purchase of the property, which was
23 recent, so it was recently discovered.

24 THE COURT: But has the property owner raised any
25 issues? I mean, I don't know whether they got notice in the

1 Kmart bankruptcy or not, but I just, you know.

2 MS. KIRBY: There is no litigation pending at this
3 time.

4 THE COURT: There's nothing pressing from the
5 property -- the neighboring property owner.

6 MS. KIRBY: There's no -- they have not commenced
7 any litigation against Greenhorn, Your Honor.

8 THE COURT: Okay. Thank you. So you're giving up
9 on the 365(d)(2) aspect of the motion.

10 MS. KIRBY: That's right, Your Honor.

11 THE COURT: Okay.

12 MS. ARTHUR: Good morning, Your Honor. For the
13 record again, Candace Arthur, Weil, Gotshal & Manges. Your
14 Honor, nothing that counsel has said today represented in
15 any of its three pleadings, supports the relief that the
16 landlord is seeking.

17 Kmart has been a tenant of the premises for nearly
18 50 years. And when you think about the alleged default that
19 the landlord is asserting, as well as the legal hurdles that
20 they have to face, the way we view it is that the landlord
21 is merely trying to recapture a lease that is below market,
22 admittedly so.

23 With the Court's indulgence, I'd like to address
24 the three alleged defaults that they've -- that they assert
25 are grounds to either compel the Debtor to reject the lease,

1 or at least to lift the automatic stay in order for them to
2 seek remedies pursuant to the lease.

3 So, Your Honor, the first claim that they've
4 provided or set forth in mid-November in the November
5 pleading is that the Kmart is encroaching on a neighboring
6 retailer's property, (indiscernible).

7 In 1989, the parties had entered into a lease
8 amendment; and pursuant to that lease, Kmart was going to
9 build an expansion, and that expansion included a portion of
10 the neighboring -- the neighbor's parcel of land, McCain
11 Foods property. Kmart entered into a purchase agreement
12 with (indiscernible) providing for them to purchase the
13 additional piece of land.

14 So two things could have happened 28 years ago:
15 either Kmart encroached on the property inadvertently and,
16 due to the passage of time, it's now Kmart's property; or
17 the encroachment that the landlord is alleging isn't an
18 encroachment at all, and it's actually exactly what the
19 parties intended, which was Kmart building on not only it's
20 land, but a portion of (indiscernible) property as well.

21 THE COURT: Okay. Well, there's no evidence that
22 the party who has the right to complain, a neighbor, isn't
23 at all concerned about this. So that's not a basis for --

24 MS. ARTHUR: We agree, Your Honor.

25 THE COURT: -- lifting the stay to proceed with an

1 eviction action.

2 MS. ARTHUR: Your Honor, we absolutely agree. The
3 next issue spoke to the underground oil tanks.

4 THE COURT: That's been resolved.

5 MS. ARTHUR: Counsel notes that's been resolved.

6 THE COURT: Right.

7 MS. ARTHUR: And the last --

8 THE COURT: They were phantom tanks; they didn't
9 exist.

10 MS. ARTHUR: Yes, Your Honor.

11 THE COURT: Okay.

12 MS. ARTHUR: The last item is the mechanic's lien.

13 THE COURT: Right.

14 MS. ARTHUR: The Debtors are, the Debtors are in
15 conversations with the vendor in connection with the lien.
16 Pursuant to the language of the lease, the Debtors have 30
17 days to discharge the lien, to the extent it is uncontested.
18 The Debtors do contest certain amounts that the lienor is
19 asserting, and we are hopeful that it will be discharged.

20 But to the extent -- and resolved -- but to the
21 extent that it's not, Greenhorn does have a remedy available
22 to it: it could actually pay the lien itself, and it has a
23 reimbursement claim pursuant to the, pursuant to the terms
24 of the lease.

25 THE COURT: Did -- has the Debtor given Greenhorn

1 any notice of what it contests?

2 MS. ARTHUR: We have not, Your Honor.

3 THE COURT: I think you should do that so that
4 they understand that you're acting within your rights under
5 the provision of the lease.

6 MS. ARTHUR: Happy to do so, Your Honor, yes.

7 THE COURT: And I don't know if there's any -- in
8 those discussions, have you alerted the mechanic's lienor
9 the risk of proceeding with a foreclosure action, as to
10 whether that would violate the stay?

11 MS. ARTHUR: I don't believe, Your Honor, the
12 business people have reached that level of discussions.

13 THE COURT: Okay.

14 MS. ARTHUR: The mechanic's, the lienor has
15 actually -- has been amenable to resolving the matter and
16 settling it.

17 THE COURT: All right.

18 MS. ARTHUR: So it hasn't reached that level yet.

19 THE COURT: Okay.

20 MS. ARTHUR: But we will make sure that the
21 mechanic's lienor is aware.

22 THE COURT: Well, I think you should at least tell
23 them that they run the risk of violating the stay if they
24 took action to foreclose. And then that way, the landlord
25 can know that, you know, there's got to be some check on

1 self-help.

2 MS. ARTHUR: We'll do, Your Honor. I think the
3 last item ended up being --

4 THE COURT: I ruled that that --

5 MS. ARTHUR: Yeah, that one's --

6 THE COURT: I mean, obviously, 365 does require
7 the Debtor to, in essence, make the monthly payments post-
8 petition, but the evidence suggests that the Debtors fully
9 intends to that. And the only reason it hasn't is that this
10 lease was purchased so recently that the Debtor thought the
11 old landlord was the proper recipient of the payments.

12 MS. ARTHUR: That's absolutely true, Your Honor.

13 THE COURT: Okay.

14 MS. ARTHUR: And payment is forthcoming; the check
15 has been sent out, so that should be received next week.

16 THE COURT: All right. So I'm going to deny the
17 motion without prejudice for -- you know, I would say this
18 with any motion -- for relief from the stay to renew if the
19 facts change.

20 MS. KIRBY: Your Honor, would you consider, to
21 avoid my client having to pay the costs of another motion;
22 would you consider a conditional order?

23 THE COURT: No.

24 MS. KIRBY: Okay. Thank you.

25 THE COURT: I don't -- given the grounds for the

1 stay motion here, I don't trust the landlord to act on the
2 conditional order in the way that it should.

3 MS. KIRBY: Thank you, Your Honor.

4 THE COURT: Okay.

5 MS. ARTHUR: Thank you, Your Honor.

6 THE COURT: Okay.

7 MS. PESHKO: Good morning, Your Honor. Olga
8 Peshko, Weil, Gotshal & Manges for the Debtors.

9 THE COURT: Good morning.

10 MS. PESHKO: The next item on the agenda is a
11 motion by Brian Coke Ng, ECF #1006.

12 THE COURT: That's Ng for the court reporters.

13 MS. PESHKO: That's right. We became aware this
14 morning at 10:15 an additional document was filed by Mr. Ng,
15 as a late-filed reply to the Debtors' objection. We have
16 obviously not had a chance to review that and respond
17 accordingly, Your Honor.

18 THE COURT: Okay. I think he's representing
19 himself. Mr. Ng, are you on the phone?

20 MR. NG: I'm right here.

21 THE COURT: Oh, you can come up.

22 MR. NG: Good morning, Your Honor.

23 THE COURT: Good morning. And you're Mr. Ng,
24 right?

25 MR. NG: Yes. Yes, Your Honor.

1 THE COURT: Okay.

2 MR. NG: Yes. I'm here because I received the
3 defendant -- the Debtors' objection, and I would like to
4 respectfully submit a reply brief. I sent an email to them
5 yesterday, to everybody on the list. And I'm here because
6 I'm not feeling too well, and I would like the Court to
7 accept my brief.

8 THE COURT: Well, you can file it, but I'm not
9 going to read it now. It looks like it's pretty voluminous.
10 But let me just get -- and I appreciate you representing
11 yourself, and you're not a lawyer, right?

12 MR. NG: No, no.

13 THE COURT: Okay. So as I understand it, you're
14 looking for relief from the automatic stay --

15 MR. NG: Yes.

16 THE COURT: -- to proceed with a lawsuit that's
17 pending in New York State Supreme Court, and you attached
18 the amended complaint --

19 MR. NG: Yes.

20 THE COURT: -- to your motion. And it's really a,
21 as I gather it, a lawsuit that's against a number of
22 parties, but including Kmart Pharmacy; it's mostly in
23 connection with the data breach?

24 MR. NG: Yes.

25 THE COURT: Okay.

1 MR. NG: It's not too much of a data breach; it's
2 alteration of the medical, my medical records.

3 THE COURT: Okay. It relates to -- it's not a
4 personal injury suit; it's more of a medical records related
5 action.

6 MR. NG: Yes.

7 THE COURT: Okay. And originally when you brought
8 the motion, you stated that you were prepared to limit
9 recovery in the lawsuit to available insurance.

10 MR. NG: Yes.

11 THE COURT: You know, the motion says Movant is
12 not seeking to recovery anything directly from the Debtors
13 or their bankruptcy estates.

14 MR. NG: Yes.

15 THE COURT: And the Debtors have responded saying,
16 we have insurance that might have covered this claim, but
17 it's been used up; the limits have been exceeded. And
18 there's no separate obligation under the insurance policy
19 for the insurer to defend us.

20 So, in essence, we're -- this is really, unlike
21 the statement in the motion, the only way that there would
22 be a recovery in connection with a claim against Kmart
23 Pharmacy here would be from the Debtor.

24 MR. NG: Well, with respect to that, that's why I
25 made a reply brief, because the objection itself, it

1 referenced insurance that they made in their objection does
2 not go directly to the claim that I have that was -- the
3 insurance that they make reference to has not covered period
4 that met my claim is about.

5 THE COURT: So do you think there is other
6 insurance?

7 MR. NG: Yes. I have stated it in my reply brief.

8 THE COURT: All right. So that's what your brief
9 covers?

10 MR. NG: Yes, yes.

11 THE COURT: All right. So I'll adjourn this so
12 that you can file that.

13 MR. NG: Yes.

14 THE COURT: And if you've identified insurance
15 that the Debtors haven't, I imagine they'll stipulate to the
16 relief.

17 MR. NG: Thank you.

18 THE COURT: But if not, I think the motion should
19 be denied because clearly, this is just a claim that would
20 otherwise be dealt with in the process of doing the pre-
21 bankruptcy claims. And at this point in the case, it's way
22 too early to spend hundreds of dollars on liquidating those
23 types of claims.

24 MR. NG: And that's why, Your Honor, I laid
25 everything out in here --

1 THE COURT: All right.

2 MR. NG: -- and exhibits.

3 THE COURT: Okay. So I'll adjourn this to the
4 next omnibus day, which is -- is it February 14th, is that
5 the next omnibus day? But I'm going to ask you, if the
6 Debtors show you that this insurance doesn't really cover
7 your claim and you agree, then you should withdraw the
8 motion because I'm not going to grant it otherwise.

9 If they agree with you that it's covered by
10 insurance and you're limiting, they'll give you a
11 stipulation that says the stay is lifted and you'll only
12 recover for insurance. But if neither of those things are
13 agreed, then we'll have the hearing on the 14th.

14 MR. NG: Well, at least pertaining here.

15 THE COURT: So you should file -- I don't know if
16 you filed it yet, but you should file it on the docket.

17 MR. NG: Yes. I will do so upstairs.

18 THE COURT: Okay. All right, very well.

19 MR. NG: Appreciate it, Your Honor.

20 THE COURT: Thank you.

21 MS. PESHKO: Thank you, Your Honor. The next two
22 items on the agenda are the motion and objection filed by
23 Ms. Smith. The motion is for relief from the stay with
24 respect to a prepetition action. With respect to the same
25 prepetition action, Ms. Smith filed an objection to the

1 Debtors' motion to extend the automatic stay to certain non-
2 debtor parties.

3 THE COURT: All right.

4 MS. PESHKO: I just wanted to note for the Court
5 that the Debtors objected to the motion filed by Ms. Smith.
6 And the Debtors seek in their reply to adjourn the
7 objection, the motion with respect to the objection, to
8 extend the automatic stay until further notice, Your Honor,
9 indefinitely. And I will cede the floor.

10 THE COURT: Why do -- I mean, it's been briefed.
11 Why do want to adjourn it?

12 MS. PESHKO: Sure, Your Honor. So there's nothing
13 happening in the prepetition action until July, which is
14 when the pretrial conference is going to be happening; all
15 discovery has been completed. The actual trial is currently
16 scheduled until September; however, that adjournment
17 happened pending the Bankruptcy Court, this Court's
18 adjudication of the motion to lift the stay with respect to
19 the Debtors.

20 THE COURT: How do we know that? Is there some
21 order from the State Court saying that all matters are
22 stayed until the Court rules on the lift stay motion?

23 MS. PESHKO: This happened over a conference call,
24 Your Honor, so I'm not sure.

25 THE COURT: Okay.

1 MS. PESHKO: But we can get it from them.

2 THE COURT: All right. Is anyone here for Ms.
3 Smith?

4 MS. POLLICK: Yes, Your Honor.

5 THE COURT: Okay. Oh, I have one other question
6 for you, either of you can answer this. The order granting
7 the motion to extend the automatic stay had a list of
8 actions and third parties who would be protected by that
9 order. Was this particular action on that list, or was it -
10 - or is this one that the Debtors sought to add to the list?

11 MS. PESHKO: This one was on the motion
12 originally, Your Honor, but we removed it when we adjourned
13 this objection.

14 THE COURT: Okay. But is it in the order?

15 MS. PESHKO: It is not in the order, Your Honor.

16 THE COURT: Okay. All right. So in essence, it's
17 subject to that notice period, that the order contemplates,
18 although it's not teed up, I guess, so that I could decide
19 it today.

20 MS. PESHKO: Your Honor, we adjourned the motion
21 with respect to the objection of Ms. Smith --

22 THE COURT: Okay.

23 MS. PESHKO: -- until today.

24 THE COURT: Right, until today.

25 MS. PESHKO: That's right.

1 THE COURT: All right. Okay, very well.

2 MS. POLLICK: Thank you, Your Honor. My name is
3 Cynthia Pollick, and I represent Karen Smith, who's a
4 creditor in this matter. One of the interesting things that
5 we found out, based on the filings of the Debtor, is that
6 actually all three parties that are named in the state
7 action -- Sears Logistics, Inc., Tim McCann and Scott Walsh
8 -- all three are not a debtor. It is -- they've not been
9 named as a debtor in the action.

10 THE COURT: Right.

11 MS. POLLICK: So, therefore, as to --

12 THE COURT: Well, what -- you mean in this case?

13 MS. POLLICK: Yes.

14 THE COURT: Yes.

15 MS. POLLICK: And so actually, I didn't even have
16 to file a motion to lift, but the attorneys in the state
17 action did. They suggest that --

18 THE COURT: Well, your motion to lift was as to,
19 as far as the Debtor. The Debtor is a defendant, too.

20 MS. POLLICK: Here. But I hadn't -- that's based
21 on the fact that the attorneys for -- in the state action
22 filed a suggestion of bankruptcy in the state action. So I
23 believed, but then based on the filings, especially the
24 seeking of the automatic stay to extend to non-debtors --

25 THE COURT: Right.

1 MS. POLLICK: -- it lists the three parties that
2 are named in my state action, which confirms that none of
3 those three parties are actually a debtor in this
4 proceeding.

5 THE COURT: I'm sorry. Is Sears Logistics
6 Services, Inc. the debtor in front of me?

7 MS. PESHKO: Yes, Your Honor. It is the former
8 name of Innovel Solutions, Inc.

9 THE COURT: All right. So Sears Logistics
10 Services is a debtor in front of me.

11 MS. POLLICK: Well --

12 THE COURT: So you needed to make the motion for
13 relief from the stay.

14 MS. POLLICK: In regards to one party.

15 THE COURT: Right.

16 MS. POLLICK: One party, which would have been if
17 it was considered. It was Sears Logistic I sued; I did not
18 sue until the --

19 THE COURT: But if it's the f/k/a, it's the same
20 entity.

21 MS. POLLICK: Okay, Your Honor. I'm just making
22 that argument. Obviously, I'm not fully aware of all the
23 little bankrtupcy intricacies because --

24 THE COURT: It's not a bankruptcy intricacy. It's
25 a corporate -- it's another -- if Sears Logistics Services,

1 Inc. is today a debtor in a different -- as a successor to
2 Sears Logistics, Inc. Put it differently, if you were on
3 against Sears Logistics, Inc. and there's nothing there
4 because it's all now -- what's the name? --

5 MS. PESHKO: Innovel.

6 THE COURT: -- Innovel, then I don't know what
7 good it would do you. So I think it's Innovel that you're
8 really suing today. You have to fix the caption, but it's
9 the same entity.

10 MS. POLLICK: Okay, Your Honor. What really, I
11 think that the Court could do for us today, is to make sure
12 that the automatic stay does not go to the two individuals
13 that are low-level employees.

14 And I have case law that it's well established,
15 stays pursuant to Section 362(a) are limited to the debtor
16 and do not encompass non-bankruptcy co-defendants. And in
17 this case, I have two low-level managers; there is no
18 indemnity agreement, no nothing. They, again, are low
19 level, have no protection. And I have filed supplemental
20 case law and have shown the Court that those two
21 individuals, I should be able to proceed; there should be no
22 extension.

23 Contrary to your order on the other cases that you
24 already entered an order saying it's covered, they were
25 companies; they weren't individuals that have low level and

1 are not -- there's no indemnity agreement or anything like
2 that.

3 So we request that the Court entertain our
4 adjournment; they certainly had time to address. They
5 addressed 300 cases last time they were here before you, so
6 certainly, they have had time to address this. And we seek
7 the Court's permission to not have the stay cover the two
8 individuals.

9 THE COURT: So you're opposing their request for
10 the adjournment.

11 MS. POLLICK: Absolutely.

12 THE COURT: Okay. Let me -- the Complaint in the
13 Luzerne County action is attached as Exhibit A to your
14 objection to the extension. Do you have that there? I note
15 in the Complaint that it states in Paragraph 5, both
16 defendant McCann and defendant Walsh, who -- by the way,
17 those are the two people that you want to proceed against,
18 right? --

19 MS. POLLICK: Correct.

20 THE COURT: -- were employed by Sears Logistics
21 Services, Inc. And then it says, and at all time acted
22 within the scope of their employment and as agents for Sears
23 Logistics Services, Inc., right?

24 And then in Paragraph 11, it says that again,
25 McCann and Walsh were acting as defendant Sears Logistics

1 agents when they made the damning false statement that
2 plaintiff was guilty of fraud, stealing and theft, and
3 defendant Sears Logistics is vicariously liable or acting,
4 responding at (indiscernible) for their defaming conduct.
5 Right?

6 MS. POLLICK: And one thing, I had filed a
7 supplemental repose because I -- they actually assert in
8 their defenses that the individual employees were acting
9 outside of their scope. I filed that, and it's East --

10 THE COURT: I'm sorry. Who is this?

11 MS. POLLICK: The defendants in my --

12 THE COURT: McCann and Walsh say they were acting
13 outside of the scope of their employment?

14 MS. POLLICK: Yes. All three are represented by
15 the same --

16 THE COURT: I find that to be hard to believe.

17 MS. POLLICK: I have filed it, and I'm surprised
18 that the Debtor didn't --

19 THE COURT: Do you have a copy of it?

20 MS. POLLICK: Yes, absolutely.

21 THE COURT: Okay.

22 MS. POLLICK: May I approach?

23 THE COURT: Yeah, that's fine. I don't see where
24 it says that. I'm sorry.

25 MS. POLLICK: It's actually --

1 THE COURT: Which defense is it?

2 MS. POLLICK: I believe it's 8.

3 THE COURT: Oh, I see it. Well, that's
4 interesting. Have you seen this?

5 MS. POLLICK: Yes, I filed it on --

6 THE COURT: I don't see how counsel could have
7 done that, frankly.

8 MS. PESHKO: Your Honor, I would like --

9 THE COURT: I don't know why it didn't -- well,
10 she didn't have a credible conflict of interest in saying
11 that, in other words.

12 MS. PESHKO: First, I want to point out that --

13 THE COURT: It's not you guys. I understand that.

14 MS. PESHKO: Sure, sure. I just want to point out
15 that line of pursuit individuals. It doesn't specifically
16 name these parties as having been the employees outside the
17 scope of the claim, Your Honor.

18 THE COURT: Okay.

19 MS. PESHKO: In addition, Your Honor, we're here -
20 - we have a joint defense agreement in place. And so --

21 THE COURT: No, that's a separate.

22 MS. PESHKO: -- at the same time --

23 THE COURT: Look, I -- you have -- ma'am, you have
24 cited me the law, which is the general law on this issue,
25 which is that the automatic stay does not apply to third

1 parties; however, there are three very clear exceptions to
2 that. And the clearest, because it really doesn't involve a
3 lot of nuance, is, quote, "Where there is such identity
4 between the debtor and the third-party defendant that the
5 debtor may be said to be the real party defendant, and that
6 a judgment against the third-party defendant will, in
7 effect, be a judgment or finding against the debtor.

8 See in other cases. Well, that's a quote from In
9 Re. A.h. Robins Company from the Fourth Circuit. But it's
10 also noted by then-Judge Sotomayor in Queenie Ltd v. Nygard
11 International, 321 F.3d 282, 288. And by me in In Re.
12 Congregation Birchos Yosef, 535 B.R. 629, 633 (B.R. SDNY
13 2015), as well as In Re. Gucci American, Inc., 328 F.Supp.
14 2d at 441.

15 And the distinction is really discussed very
16 cogently by the District Court in DeSouza v. Plusfunds
17 Group, Inc., 2006 U.S. District Lexus, 53392 (SDNY 2006).
18 There, the stay was sought to be extended to individual
19 defendants who were former executives, or maybe even current
20 executives, of the debtor. The contention was they're
21 really being sued because of their role as executives of the
22 debtor. The District Court said that's a legitimate reason
23 to extend the stay.

24 But here, the Complaint was for intentional
25 personal misconduct in their own capacity and was not

1 subject to indemnification under Delaware corporate law
2 because there's an exemption for intentional fraud.

3 There are a lot of other cases that deal with this
4 exception, beyond the material impact that's covered by the
5 Queenie case, including In. Re. North Star Contracting
6 Corp., 125 B.R. 368 (SDNY 1991), and In Re. Lomas Financial,
7 117 B.R. 64 (SDNY 1990), and bench ruling by me in the
8 Delphi case, Case No. 05-4481 (RDD May 22, 2007, Docket
9 7995).

10 So just based on the Complaint, which alleges that
11 they're acting as Sears agent, it falls right within the
12 exception. Now, in addition to that, you've now shown me
13 the answer. But your own Complaint basically says they're
14 acting as Sears -- put it differently, your Complaint
15 doesn't say that after Ms. Smith was accused of fraud,
16 stealing and theft the day in question when she was escorted
17 from the office. Was she a former employee?

18 MS. POLLICK: She's a former employee of over 20
19 years.

20 THE COURT: Okay. All right. So, I mean, and so
21 she's just escorted from the office for that reason for
22 being -- and that was why she was fired. The Complaint
23 doesn't go on to say that thereafter, other than a report to
24 the police department, these two people, you know, published
25 the alleged defendant or statements anywhere. It just says

1 they're acting in Sears' behalf as its agent, so it falls
2 right into the exception.

3 So you have put in -- you have shown me the
4 answer, which might constitute some sort of admission,
5 although it's a little ambiguous. And, frankly, I don't see
6 how, again, counsel for all three of them could have made
7 that statement.

8 But in light of that and given the fact that we're
9 not, unless you can tell me otherwise, anywhere close to any
10 activity in the case for a few months. It sounds like we
11 should adjourn this to get to the bottom of the answer.

12 MS. POLLICK: Well, Your Honor, first of all, the
13 only reason -- we have pretrial stuff actively to do; that's
14 the only reason why it was extended because of the fact the
15 court has the pretrial --

16 THE COURT: Right.

17 MS. POLLICK: -- you know, whatnot. But the
18 evidence in this case actually shows that they went, the
19 human resource manager actually admitted that they were not
20 allowed to go to the police station and make --

21 THE COURT: Well, I don't have any of that, so you
22 could supplement it. I'm just going by your Complaint, and
23 the Complaint is suing them as agents. So it would seem to
24 me that any judgment against these two individuals would be
25 a judgment against Sears, I mean, under -- because Sears

1 could be collaterally estopped. So just, it falls right
2 into the exception to the general rule.

3 THE COURT: And I would just argue that there's a
4 Southern District New Jersey -- I mean, New York case, In
5 Re. Wolf, that says in limited instances, courts have
6 extended the stay prosecution of civil actions against
7 officers and employees.

8 THE COURT: Oh, look, just because they're not an
9 officer -- I mean, frankly, I'm more sympathetic to them
10 because they're not an officer. That's, you know, the whole
11 point is that they're acting on behalf of Sears, at least
12 under the Complaint.

13 MS. POLLICK: And I --

14 THE COURT: They're being sued because they were
15 acting as Sears' people, not because they, you know, did
16 something different. And I would like you all to discuss
17 the answer, and I'd like you all to discuss how conceivable
18 it could be to be severed. I mean, I don't know it could be
19 severed because it sounds to me like a lot of the activity
20 here, maybe all of it, was, you know, on the day in question
21 or go into the police department and that was it.

22 So, I mean, I would like to know how the trial
23 would work without implicating Sears as part of collateral
24 estoppel.

25 MS. POLLICK: If we could sever it because I've

1 named them individually.

2 THE COURT: I'd like you to show me the rules for
3 Pennsylvania on collateral estoppel. I don't think that
4 answers my question. Collateral estoppel applies to
5 privies, people in privity generally. I mean, in New York,
6 it does; I'm assuming it does generally. So I'm going to
7 adjourn this so you all can talk about it and further brief
8 it if you want to.

9 MS. POLLICK: Okay. Thank you, Your Honor.

10 THE COURT: Okay.

11 MS. PESHKO: Your Honor, with respect to the
12 motion to lift the stay as to the debtors.

13 THE COURT: Well, that's denied. I mean, it's
14 just as to insurance.

15 MS. PESHKO: Right.

16 THE COURT: Again, the timing is such that there's
17 no emergency here. This is not a personal injury case; it's
18 really a prepetition claim. There's really no reason to
19 lift the stay as to Sears.

20 MS. PESHKO: We will submit an order to the Court,
21 Your Honor. Thank you.

22 THE COURT: Okay.

23 MS. PESHKO: That is the last item on the agenda,
24 Your Honor.

25 THE COURT: Okay. I also note that motion, like

1 Mr. Ng's motion, assume that there might be insurance.
2 Unlike Mr. Ng, there's no response saying well, there still
3 might be insurance notwithstanding what the Debtors say.
4 So, again, there's no real basis under Sonnax to lift the
5 stay here.

6 MS. PESHKO: Thank you, Your Honor.

7 THE COURT: Okay.

8 (Whereupon these proceedings were concluded at
9 11:31 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

Digitally signed by Sonya Ledanski
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